

***United States Court of Appeals
for the Second Circuit***



APPENDIX

APPENDIX

76-1396

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

NOTICE OF MOTION

- v -

Ind. No. 63 Cr. 190 (CHT)

SALVATORE VALVOLIZZA,

Petitioner.

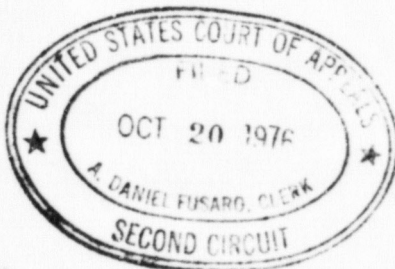
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S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of GINO E. GALLINA and SALVATORE VALVOLIZZA, the accompanying Memorandum of Law, and all of the prior proceedings, the undersigned will move this Court on the day of , 1976, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, for an order setting aside petitioner VALVOLIZZA's plea and conviction on the ground of manifest injustice, or, in the alternative, for an order directing a hearing, and for such other and further relief as the Court deems just and proper.

DATED: New York, New York

May , 1976



YOURS, etc.

GINO E. GALLINA
Attorney for Petitioner
30 Broad Street
New York, New York 10004

TO: HON. THOMAS CAHILL
United States Attorney
Southern District of New York

Clerk of the U.S. District Court
Southern District of New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

- v -

AFFIDAVIT

SALVATORE VALVOLIZZA,

Ind. No. 63 Cr. 190 (CHT)

Petitioner.
-----X

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

GINO E. GALLINA, being duly sworn, deposes and says:

1. I am the attorney for the petitioner SALVATORE VALVOLIZZA, am fully familiar with the facts and circumstances of this case, and make this affidavit in support of the contention that the guilty plea must be set aside because there was an insufficient factual basis for it to be accepted.

2. Petitioner was indicted in a 73 count, 27 page long indictment alleging various violations of the complex Immigration and Naturalization laws regarding quotas and the like.

3. On October 14, 1968 petitioner offered to plead guilty to Count 1 (conspiracy) and Count 10 (a substantive count) of the indictment. The circumstances leading up to this plea offer, and the circumstances of the plea proceeding have been the subject of three prior motions by petitioner. It must be noted, however, that these prior motions sought to invalidate the plea on entirely different grounds than the present motion, e.g., that the plea was entered involuntarily, unintelligently or unknowingly and because of the coercion of counsel (Motions 1 and 2), that the joint representation by

one attorney rendered the plea improper (Motions 1 and 2), or that petitioner was not advised of the consequences of the plea (Motion 3)*. It is petitioner's present contention that the court could not be "satisfied that there [was] a factual basis for the plea" Rule 11, Federal Rules of Criminal Procedure.

4. The minutes of the plea (set forth in relevant part as Exhibit 3) reveal that after eight pages of the indictment were read to petitioner, he merely agreed with the statements of the Court that he had discussed the "facts as you know them" with his attorney and he was guilty (Mins. 10/14/68 at 5-14). He was never asked to and he never did, give any personal and individual recitation of the "facts" or of his belief that he was guilty.

5. Immediately after the plea, petitioner advised the Probation Department that he was innocent and sent them a letter to the same effect.

6. As a result of this, on the date set for sentence, the Court questioned petitioner about whether he wanted to withdraw his plea (Mins. 2/7/69 at 11, cf Affidavit of Salvatore Valvolizza attached hereto). The following passage is extremely significant:

"THE COURT: I just want to be sure, Mr. Vavolizza, that you do believe you are guilty, regardless of what my thoughts on the matter might be. That would really enter into what my reaction would be to a motion to withdraw the guilty plea.

MR. MUCHIO: Precisely, your Honor; that is all I point it out for.

THE COURT: I am not the one to pass on guilt or innocence. All I have to do, when a guilty plea is entered under the law, is to satisfy

*Since the Court has already refused to upset petitioner's plea on these grounds, they will not be urged again here. This is not to say that they are abandoned or recanted. Petitioner stands behind the facts alleged in support of these grounds and requests that these facts be considered in support of his present claim.

myself that there is reasonable basis for the plea.

MR. MUCHIO: Exactly.

THE COURT: And by reason of the fact that I sat on the trial of the other two defendants, I can't say that I could honestly reach a conclusion as to whether you were completely familiar with the law or not. You are supposed to know the law.

THE DEFENDANT: I did not."

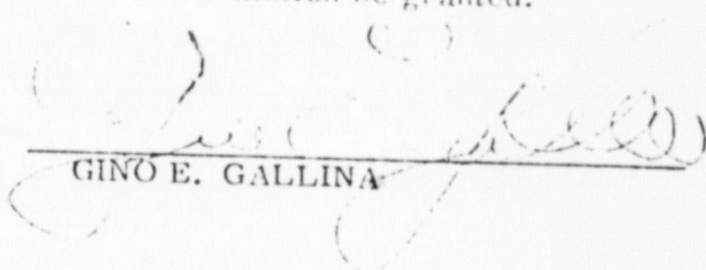
(Mins. 2/9/69 at 13)

7. After petitioner's then counsel spoke, petitioner added:

"[I]f I violated the law I was never aware of it. Talking to my counsel I believe that I have violated it." (Mins. 2/7/69 at 17-18)

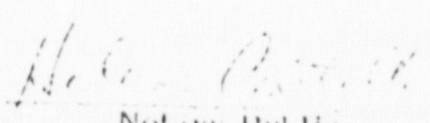
8. Based on the foregoing, it is contended that there was an insufficient basis for accepting the plea and for imposing judgment based thereon. In view of petitioner's failure to set forth in his own words what, if anything, he had done, in view of his immediate protestations of innocence, in view of the firing of his prior counsel and substitution of new counsel, and in view of the total lack of factual basis for the plea, at the least the Court should have conducted a searching inquiry into the facts of the case; at most it should have ordered the plea withdrawn.

WHEREFORE, it is requested that the motion be granted.


GINO E. GALLINA

Sworn to before me this

12th day of March, 1976.


Notary Public

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

AFFIDAVIT

-v-

Ind. No. 63 Cr. 190(CHT)

SALVATORE VALVOLIZZA,
Petitioner.

-----X
STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

SALVATORE VALVOLIZZA, being duly sworn, deposes and says:

1. I am the petitioner in this case and I make this affidavit in support of my attorney's motion to withdraw my guilty plea based upon the fact that prior attorney Saverio A. Muschio improperly waived my constitutional rights.

2. Shortly after I was coerced by my former counsel into pleading guilty, I informed the Probation Department that I was innocent and I fired that counsel.

3. Shortly thereafter I retained Mr. Muschio for the specific purpose of moving to withdraw my plea. * Contrary to the implication in the second paragraph of his affidavit (set forth in full as Exhibit I) he never told me prior to the date of sentence that I should not withdraw the plea; as a matter of fact, at our one and only meeting between the time I retained him and the date of sentence he told me that he would make the motion to withdraw the plea.

* I would respectfully ask the Court why I would have gotten a new lawyer if not for the purpose of withdrawing the previous plea?

4. On the date of sentence, shortly before the Judge took the bench, Mr. Muschio for the first and only time suggested that I not move to withdraw my plea but, instead, throw myself on the mercy of the Court. I refused to do so.*

5. Because of a severe hearing defect, of which Judge Tenney was apparently not aware, I heard very little of the proceedings on February 7, 1969.** Specifically I did not hear the Judge suggest that because of my immediate pretestations of innocence "a motion to withdraw the guilty plea would be in order" (Mins. 2/7/69 at II; the entire relevant portion of the proceeding is set forth as Exhibit 2). Because I did not hear this I did not make the motion (Mins. 2/7/69 at 11-13).

6. I did not hear the Judge address me a second time and state that whether I thought I was guilty would influence his "reaction... to a motion to withdraw the guilty plea". Once again, therefore, I did not respond***. My then counsel once again did not ask for a withdrawal of the plea, although the following remark of the Court virtually stated that such a motion would have been granted:

"[B]y reason of the fact that I sat on the trial of the other two defendants****, I can't say that I could honestly reach a conclusion as to whether you were completely familiar with the law or not". (Mins. 2/7/69 at 13) (emphasis added).

* It should be noted that in his rather vague and equivocal affidavit, Mr. Muschio states that he suggested I not withdraw my plea, but he never states that my response was that I did want the motion to withdraw the plea made.

** Even Mr. Muschio had trouble hearing the Judge (Mins. 2/7/69 at 11).

*** On both of these occasions the Court's remarks were addressed to me, but my attorney answered instead (Mins. 2/7/69 at 11, 13).

**** Which ended in a hung jury, followed by a nolle prosequi by the government.

7. In fact, I only spoke three times during this entire proceeding, once when I did hear the Judge call my name, and twice to deny I was aware I had violated the law (Mins. 2/7/69 at 11, 13, 17-18). In my own mind I thought that by saying this, I was telling the Court "I am not guilty" and that this would aid in the plea withdrawal motion, I expected Mr. Muschio to make.

I thought "How can a Judge sentence me if I say I am not guilty." When the Court did impose sentence despite my denials of guilt, I did not think that there was anything further I could say or do at that time.

8. From conversations with my present counsel I believe that my constitutional rights were violated both because my specific directions were not followed and because if they had been, my guilty plea would clearly have been set aside.

9. I hasten to point out that I have pursued this matter for the last seven years only because I believe I am innocent and I want to clear the only blemish on my past.* If I am successful at trial it would be my intention and pleasure to donate my fine to a worthy charity.

WHEREFORE it is respectfully requested that the motion be granted.

Sworn to before me this
17th day of March, 1976.

Helin Costello
Notary Public

Salvatore Valvolizza
SALVATORE VALVOLIZZA

Notary Public
New York
4519 27
City
March 19, 1976

* Contrary to the assertion of Judge Tenney in denying my prior motion to withdraw my plea, it was not motivated by the fact that my co-defendants trial ended in a hung jury and a nolle prosequi. The fact that I protested my innocence to the Probation Department only one hour after the entry of my plea shows that I am not trying to take advantage of the results of the later trial.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

SALVATORE VAVOLIZZA and MARTIN
BIRBANO,

AFFIDAVIT

63 Cr. 190

Defendants.

SAVERIO A. MUSCHIO, being duly sworn, deposes and says:

That I was retained by the defendant SALVATORE VAVOLIZZA for the purpose of determining the advisability of a motion to withdraw the plea of guilty which was entered by him in the above entitled matter on or about October 14, 1968; and

that I obtained a copy of the plea minutes and after reading and studying the plea minutes, it was my judgment that a motion to withdraw the guilty plea would be denied; and at that time I advised the defendant that the more prudent course to take would be to plead for mercy at the time of sentencing which had been scheduled for February 7, 1969.

That it is my recollection that when I met Mr. Vavolizza in Court on February 7, 1969, he mentioned again his desire to have the guilty plea withdrawn; since I felt the Court, in all probability, would deny the same, I once again suggested to the defendant that we ought to proceed with the sentence. That on the day of sentencing, to wit February 7, 1969, Judge Charles H. Tenney imposed a fine of \$7,500.00 on one count to which the defendant pled guilty and suspended a sentence of one year and placed him on unsupervised probation for one year concerning his guilty plea to the second count.

EXHIBIT I

bound to wonder and speculate and I think the practice has pretty much uniformly been they are told they pleaded guilty but are instructed, in no uncertain terms, that that is no reflection on the guilt or innocence of the others.

THE COURT: Yes, that is what I have done in the past, and even where the pleas have been entered not during the trial but before the trial, where only certain named defendants are tried -- I think that is the only way to do it. Before I do it, we better have them plead in open court and then we will call the jury in at that point.

MR. KRIEGER: May my exception be noted, just for purposes of the record, as to the jury being informed?

THE COURT: Yes. I think it is better all around to have it right out in the open, because they are going to know it eventually and you are just going to have a lot of speculation if you don't do it now.

MR. KRIEGER: I will be slightly loquacious in connection with the offer of the plea of guilty so that my clients full well understand and there won't be any question of lack of understanding.

EXHIBIT 2

THE COURT: Fine.

(In open court. Jury not present.)

MR. KRIEGER: May I have your Honor's indulgence for a second?

THE COURT: Yes.

(Pause.)

MR. KRIEGER: May it please this Honorable Court, at this time on behalf of the defendants Salvatore Vavolizza and Martin Birbano I respectfully beg leave of the Court for permission to withdraw the plea of not guilty heretofore jointly and severally entered by each of the aforesaid defendants to all counts of the indictment and each of the defendants Salvatore Vavolizza and Martin Birbano request permission to enter a plea of guilty to Counts 1 and 10 of the instant indictment.

Mr. Birbano, Mr. Vavolizza, would you please stand up.

I have asked the Court for permission to withdraw your pleas of not guilty to this indictment and have requested that the Court accept pleas of guilty to the 1st and 10th counts of this indictment. Is that your wish, each of you?

DEFENDANT BIRBANO: Yes.

DEFENDANT VAVOLIZZA: Yes.

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THE COURT: The clerk will read Counts 1 and 10 to each defendant.

THE CLERK: Defendant Mr. Salvatore Vavolizza and defendant Mr. Martin Birbano, you have your attorney with you and you withdraw your plea of not guilty and enter a plea of guilty as charged in this indictment. The grand jury indictment was filed on February 26, 1963: "From on or about December 1, 1954, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Salvatore Vavolizza and Martin Birbano, the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with various other persons unknown to the grand jury, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 1001, and to defraud the United States in the exercise of its governmental function of administering the immigration laws, and of its right to have the business and affairs of the Immigration and Naturalization Service, United States Department of Justice, conducted honestly and free from fraud, deceit, misrepresentation,

interference and obstruction.

"It was part of said conspiracy that the defendants Salvatore Vavolizza and Martin Birbano in matters within the jurisdiction of a department and agency of the United States, to wit, the United States Department of Justice, Immigration and Naturalization Service, would and did unlawfully, wilfully, and knowingly make and cause to be made false, fictitious and fraudulent statements and representations in first preference quota immigrant visa petitions and supporting documents to the petitions.

"It was a further part of said conspiracy that the defendants Salvatore Vavolizza and Martin Birbano would and did arrange for the petitions and supporting documents containing false, fictitious and fraudulent statements and representations to be filed with the United States Immigration and Naturalization Service for the purpose of inducing the United States Immigration and Naturalization Service to approve the said petitions, thereby enabling aliens to obtain classification as first preference quota immigrants for permanent residence in the United States, to which they were not entitled.

"Among the means by which the defendants

would and did carry out the aforesaid conspiracy were the following:

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be made writings on the stationery of petitioners, which writings contained false, fictitious and fraudulent statements concerning the nature of the petitioner's business, the average number of petitioner's employees, the average net annual income of the petitioner, the description of the prospective work of the alien beneficiary, the reasons why the services of the alien beneficiary are urgently needed in the United States, how the alien's services will be substantially beneficial to the national economy, cultural interests or welfare of the United States.

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be made writings, for the purpose of obtaining clearance orders from the United States Employment Service, which writings contained false, fictitious and fraudulent statements as set forth in subparagraph (a) above.

"The defendants Salvatore Vavolizza and Martin Birbano would and did make and cause to be

made first preference petitions, containing false, fictitious and fraudulent statements of the same nature and description as set forth in subparagraph (a) above.

"The defendants Salvatore Vavolizza and Marti Birbano would and did file and cause to be filed with the United States Department of Justice, Immigration and Naturalization Service, the petitions, statements in support thereof and the United States Employment Service clearance orders, hereinabove referred to in subparagraphs (a), (b) and (c), in the names of the petitioners.

"Overt acts.

"In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, the defendants committed the following overt acts, among others:

"On or about February 1, 1957, the defendants Salvatore Vavolizza and Martin Birbano had a conversation with Anthony Fasciglione at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 1, 1958, the defendant Martin Birbano had a conversation with

Philip Nisi at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

On or about March 5, 1958, the defendant
Martin Birbano received a petition signed by
Mary DiBenedetto, at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

"On or about December 1, 1958, the
defendant Martin Birbano had a conversation with
Joseph Lombardo at the Bambace Travel Agency,
94 Hamilton Avenue, White Plains, New York.

"On or about January 2, 1958, the
defendant Louis P. Bambace had a conversation with
Angelina Celina at the Bambace Travel Agency, 94 Hamilton
Avenue, White Plains, New York.

"On or about April 30, 1960, the
defendant Louis P. Bambace had a conversation
with Rocco Cipriano and Gaetano Forgiione at
the Bambace Travel Agency, 94 Hamilton Avenue,
White Plains, New York.

"On or about April 11, 1959 the
defendant Domenico Quartarolo had a conversation
with Raffaele Parrella at the Salvatore Vavolizza
Travel Service, 3533 White Plains Road, New York,
New York.

"On or about April 11, 1959, the defendants Martin Birbano and Salvatore Vavolizza received from Raffaele Parrella the sum of \$50 at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 16, 1959, the defendant Domenico Quartarolo received from John Maura three letterheads of Peters Shell Service, 260 Plandome Road, Manhasset, New York, at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about March 16, 1959, the defendants Domenico Quartarolo and Salvatore Vavolizza received from John Maura the sum of \$50 at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about June 10, 1960, the defendant Martin Birbano had a conversation with Ernest Troiano at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York.

"On or about August 18, 1960, the defendant Salvatore Vavolizza filed a petition and supporting documents in the name of Craft Construction Co. with the United States Immigration and

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Naturalization Service at New York, New York.

"On or about July 7, 1960, the defendant Martin Birbano received at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York, a visa petition and two letters on the stationery of the Grenada Furniture Co., all signed by Mario Macaluso.

"On or about April 1, 1960, the defendant Martin Birbano received at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York, a blank visa petition form, I-130, and some blank letterhead stationery of Michael Bello Nurseries, Brooklyn, New York, all signed by Oliver Bello.

"On or about April 1, 1960, the defendant Martin Birbano, at the Salvatore Vavolizza Travel Service, 3533 White Plains Road, New York, New York, filled in the visa petition form I-130 and composed two letters on the stationery of Michael Bello Nurseries which had been previously signed in blank by Oliver Bello.

"On or about March 30, 1956, the defendants Salvatore Vavolizza and Martin Birbano had a conversation with Rosina and Frank Manata at the Salvatore Vavolizza Travel Service,

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3533 White Plains Road, New York, New York."

Count 10 is a supporting statement,
October 23, 1959 -- supporting statement to a visa
petition:

"G. DiBenedetto is in urgent need for
the services of Carmela Nicita as a Tailor I
(examiner). G. DiBenedetto did not have urgent need
for the services of Carmela Nicita as a Tailor I
(examiner). Would have used her only as a sewing
machine operator."

Counts 2 through 16: "The grand jury
further charges that on or about the dates hereinafter
set forth, in the Southern District of New York,
Martin Birbano and Salvatore Vavolizza, defendants in
a matter within the jurisdiction of a department
and agency of the United States, to wit, the Department
of Justice, Immigration and Naturalization Service,
unlawfully, wilfully and knowingly did make and cause
to be made a false, fictitious and fraudulent statement
and representation as hereinafter specified, whereas
in truth and in fact, as the defendants then and
there well knew, the specified statement was not
true as hereinafter specified.

"The allegations contained in

paragraph 1 are alleged and realleged in Counts 2 through 16 ,as if fully set forth therein."

THE COURT: Mr. Vavolizza, did you hear the charges read to you by the Clerk?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT. Do you understand the charges that were read to you?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: I take it that you have conferred with Mr. Krieger and you have given him all the facts as you know them with respect to the charges that were read; is that correct?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: And after having discussed the matter with him, do you feel that he is familiar with this case and in a position to advise you as to your plea?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: So you say that as to those charges that were read to you you are guilty and you did commit the acts that were charged against you in those counts; is that correct?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: Has anybody threatened

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or coerced you in any way to get you to enter a plea of guilty to these counts?

DEFENDANT VAVOLIZZA: No.

THE COURT: You are pleading, then, voluntarily and with an understanding of the nature of the charges made against you; is that so?

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: Did anybody make any representation to you or promise as to any sentence that might be imposed by the Court if you would plead guilty?

DEFENDANT VAVOLIZZA: No.

THE COURT: You understand, of course, that the other counts will remain open until the date set for sentencing and that on acceptance of your plea of guilty all that remains for the Court to do is impose sentence on the date set for that purpose? Do you recognize that fact?

MR. VAVOLIZZA: Yes, sir.

(Mr. Direnzo entered the courtroom at this point.)

THE COURT: You recognize the fact also that these particular counts, as I understand it, have a maximum sentence which could be imposed

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of up to five years and, I think, a \$10,000 fine?

Is that correct, Mr. Kaplan?

MR. KAPLAN: It is correct, your Honor, on each.

THE COURT: Well, from the testimony that has been received to date on these particular counts, the Court is satisfied that the defendant Vavolizza is guilty of those charges and accordingly accepts the guilty plea.

You don't need to stand any further, Mr. Vavolizza. You may sit down.

Mr. Birbano, you heard the charges read by the Clerk?

DEFENDANT BIRBANO: Yes, sir.

THE COURT: And you understand those charges?

DEFENDANT BIRBANO: Yes.

THE COURT: And you also have conferred with Mr. Krieger and given him all the facts relating to these charges?

DEFENDANT BIRBANO: Yes.

THE COURT: And you are satisfied that he knows what the facts are?

DEFENDANT BIRBANO: Yes.

probation for a period of one year.

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MR. FUSCO: Thank you, your Honor.

THE COURT: The sentence is on each count to run concurrently and execution is suspended.

MR. FUSCO: May I move as to the open counts that they be dismissed.

MR. KAPLAN: The Government has no objection, your Honor.

MR. FUSCO: Thank you again, your Honor.

THE COURT: Mr. Vavolizza.

DEFENDANT VAVOLIZZA: Yes, sir.

THE COURT: I would suggest, in view of the letter and the position that you have taken, that possibly a motion to withdraw the guilty plea would be in order. X

MR. MUCHIO: If I may add, your Honor, on that point, with the Court's permission.

THE COURT: I wouldn't be frankly confused in this regard by any sentence that was passed on Mr. Birbano.

MR. MUCHIO: I didn't hear your Honor's remarks.

THE COURT: I would not be misled or confused by the sentence imposed on Mr. Birbano.

MR. MUCHIO: Not at all, sir, believe me. I think that your Honor knows that while the trial of the remaining defendants was in progress, I stated my position on the record.

My analysis of the case, of this particular situation, I think is most succinctly evaluated by your Honor's remark on the record when the plea was proffered, namely, that your Honor had sat in on the trial for some four or five days, and after having heard some testimony in the case -- not all of it, but sufficiently enough to at least acquaint your Honor with the true facts in the case, you felt in the circumstances that the plea was a proper one.

Now, I could understand the defendant's position being somewhat paradoxical, or the position which he indicates in that report, is a result of a great deal of emotional strain and psychological reaction to all that has happened to him in this case.

Like the other defendant, if I might add, whatever it was that constituted his involvement in the framework of this indictment, he thought was proper.

I don't believe, your Honor, even when I now discuss it with him in finality, I don't believe that he fully was aware of the full import of his acts, al-

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though it was purposeful and intentional.

I think he has come to realize that now, that whatever he did was violative of the statute made and provided for in those cases. There is no question about it, your Honor. He is here ready this morning for judgment.

THE COURT: I just want to be sure, Mr. Vavolizza, that you do believe you are guilty, regardless of what my thoughts on the matter might be. That would really enter into what my reaction would be to a motion to withdraw the guilty plea.

MR. MUCHIO: Precisely, your Honor; that is all I point it out for.

THE COURT: I am not the one to pass on guilt or innocence. All I have to do, when a guilty plea is entered under the law, is to satisfy myself that there is reasonable basis for the plea.

MR. MUCHIO: Exactly.

THE COURT: And by reason of the fact that I sat on the trial of the other two defendants, I can't say that I could honestly reach a conclusion as to whether you were completely familiar with the law or not. You are supposed to know the law.

THE DEFENDANT: I did not.

THE COURT: And there is no question in my mind that for the limited purposes that we are dealing with now there is probable cause to believe that you were guilty. The jury might not, I don't know.

MR. MUCHIO: I think he fully appreciates that, Judge.

THE COURT: I think Mr. Vavolizza's situation is different the other defendant. He was the principal and the one who principally profited by it, and I have to consider whether sending this man to jail accomplishes anything.

MR. MUCHIO: Now that we have had that aspect out of the way, I can understand that your Honor has a full report, and I would indulge upon the Court to understand at least what his reactions are at this point.

I don't say that he was right. I think that he is firmly and fully convinced now that he is not right. He is not here now to plead with the Court with respect to whether or not the plea should have or should not have been accepted. We are beyond that at this stage. We are here now hoping to receive some mercy at this Court's pleasure this morning.

I point out the fact that this defendant is

a man fifty-eight years of age. He, too, like the co-defendant in this case, immigrated to this country at the age of nineteen years, and managed to get himself involved in various employments. At one time he was working in a bank as a clerk. He then also attended school for the purpose of getting instructions on insurance and became an agent. He worked at that vocation for a while and then also got a broker's license.

It is true that he was engaged in this travel business, and was engaged in this practice for some perhaps five or six years before the date set forth in the indictment.

Now, your Honor, this indictment, I need not remind your Honor, was pending for five years. Suffice to say that he is no longer engaged in that aspect of the business.

He has a family, some of the members of which are in court. He has been married to the same woman since 1941, has three children; his son Victor is presently in court, married and has a child of his own. He has a daughter who is a senior at Fordham University studying journalism. And they have a younger son fifteen years of age who is a sophomore at Fordham Prep.

There is no question in my mind that your Honor has been sorely troubled with the punishment that is to be imposed here. There is no question about it that when a man violates the law he must in a sense accept the fact that punishment can and sometimes is meted out.

I am asking your Honor that you balance your thoughts about it and consider the usefulness of this man as a citizen of the community in which he lives, and of course, the importance of this man to be at large so that he can continue to provide for his family.

Your Honor, I suggest to you that the defendant realizes now -- he is penitent -- I suggest to you that never again will he violate the laws of this jurisdiction or any other jurisdiction as far as that goes.

Now, your Honor might be concerned that perhaps the report will reflect that he is still engaged in the travel business, but principally, sir, with travel as such, which I think is basically what a travel agency should be doing.

But I think the report will also indicate that this is a man who is also an intelligent man. I am not going to say before your Honor that this man

didn't know, that he hasn't had the sufficient capacity or intelligence; on the contrary, the report will indicate that this is a man of tremendous capacity and creative ingenuity.

He has managed through the years to support his family through resolution and dedication to work, and he has enjoyed a somewhat modest financial security.

I am not suggesting to you that this man is entirely bereft of any kind of material wealth; that is not the case.

I say to your Honor, if I may only paraphrase this, that I don't believe that incarceration at this stage in life, considering all of the aspects of this case, will serve any useful purpose as far as society is concerned.

I think that this man would be best suited to maintain his position and to once again assume the role of husband and father and respectability to his family and friends. I ask your Honor for mercy, please, sir.

THE COURT: Mr. Vavolizza, is there anything you want to add to what your counsel has said?

THE DEFENDANT: No, except that if I violated the law I was never aware of it. Talking to

my counsel I believe that I have violated it.

THE COURT: Mr. Kaplan.

MR. KAPLAN: If your Honor pleases, I would like to say only this with respect to the suggestion by Mr. Vavolizza that at the time of the offenses charged he was ignorant of the law.

Your Honor will recall that at the hearing on the motion to suppress I adverted to a letter from Mr. Vavolizza in which he informed the Government that in his opinion the law was not really what it should be and precisely recommended suggestions of changing it.

In addition, over the week-end, intervening between the third day of the trial and Monday morning, at which time Mr. Vavolizza offered his plea of guilty, a tape recording of a conversation, Mr. Vavolizza had quite a lengthy one with the Chief of the New York District of Immigration and Naturalization Service, which was played for his attorney, in which there were similar remarks made.

So that the Government suggests that any cotestations of ignorance of the law --

THE COURT: It wouldn't make any difference anyway. I believe that a substantial fine should be imposed here. I have reservations about committing

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this man to jail. He has no prior infractions. I think the man has gone through a good deal in the past year, and I have to consider that.

Of course, I feel that this man made a substantial amount of money in this. I could fine him up to \$10,000 on each count. However, as to Count 1 I will fine him \$7,500. As to Count 2 I will sentence him to one year, suspend execution, and place him on unsupervised probation for one year.

MR. KAPLAN: Is that going to be a committed fine?

THE COURT: That will be a committed fine, but I will give him --

MR. MUCHIO: Will your Honor allow us some reasonable time?

THE COURT: Three months?

MR. MUCHIO: I think that is ample time.

THE COURT: Is that agreeable, Mr. Kaplan?

MR. KAPLAN: That would be agreeable, your Honor. That would be May 15th.

THE COURT: All right.

MR. KAPLAN: Does counsel have a motion with respect to the open counts?

MR. MUCHIO: I have a motion with respect

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to the open counts that they be dismissed.

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THE COURT: As to the remaining counts they are dismissed.

MR. MUCHIO: Thank you, sir.

THE COURT: That is true also as to Mr. Birbano.

MR. MUCHIO: Thank you again, your Honor.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Irving Wolfson

Official Court Reporter
U. S. District Court